

TCEQ DOCKET NO. 2010-0237-MWD

**APPLICATION OF THE CITY OF
BULLARD FOR TPDES PERMIT
FOR MUNICIPAL WASTEWATER
AMENDMENT TO PERMIT NO.
WQ0011787001**

**§ BEFORE THE TEXAS COMMISSION
§
§
§
§ ON ENVIRONMENTAL QUALITY**

APPLICANT'S RESPONSE TO HEARING REQUESTS

COMES NOW the City of Bullard ("Applicant") and pursuant to 30 Texas Administrative Code ("TAC"), Chapter 55, Subchapter F (Sections 55.200-55.211) submits this Response to Hearing Requests to the Texas Commission on Environmental Quality ("TCEQ") to challenge the standing of each party filing a hearing request on Application for Proposed TPDES Permit No. WQ0011787001 (the "Application") on the grounds that the requests for hearing do not meet applicable statutory and regulatory requirements. In support of this Response, Applicant respectfully submits the following:

I. Summary of Facts

Applicant applied for a major amendment to its TPDES Permit No. WQ0011787001 on April 22, 2009 and it was declared administratively complete on June 3, 2009. The major amendment to its current permit will allow Applicant to continue to discharge municipal wastewater from its wastewater treatment facility, increasing such discharge from a daily average flow not to exceed 213,000 gallons to a daily average flow not to exceed 438,000 gallons into an unnamed tributary which then flows to Flat Creek and then to the Neches River below Lake Palestine in Segment No. 0604 of the Neches River Basin.

Following publication of notices concerning the Application and opportunity for public comment, which ended on November 13, 2009, the Executive Director issued a Response to Public Comment on January 11, 2010. The period for requesting reconsideration or a contested

case hearing ended on February 11, 2010. HRC Cherokee Tree Farm, L.P. (“HRC”) and Texas Conservation Alliance (“TCA”) and Dr. Adrian Van Dellen (“Van Dellen”) timely filed requests for contested case hearing on February 8, 2010 and February 11, 2010, respectively.

II. Argument as to Affected Person

A. Hearing Request Requirements

As the Commission is well aware, in order for the Commission to consider a hearing request, the Commission must first determine whether the request meets certain requirements. In addition to the requirements set out in 30 TAC §55.201(c), subsection (d) indicates the request must:

- (1) Give the name, address, daytime telephone number and where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number and where possible, fax number, who shall be responsible for receiving all official communications and documents for the group.
- (2) Identify the person’s personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestors location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) Request a contested case hearing;
- (4) List all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission’s determination of the number and scope of issues to

be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the disputes and list any disputed issues of law or policy; and

(5) Provide any other information specified in the public notice of application.

B. Specifics as to the Requestors.

Van Dellen and TCA fail to state any specifics in their Request for Contested Case Hearing filed on February 11, 2010 and in fact, simply reiterate the same information set out in their letter dated October 27, 2009 concerning comments on the Application. In the Executive Director's Response to Public Comment dated January 11, 2010, there is extensive discussion of the various items raised by Van Dellen and TCA and yet none of these Comments and Responses is raised with any specificity in their Request for Contested Case hearing. In fact, Van Dellen and TCA continue to vaguely refer to concerns as to Van Dellen's interests and how they might be affected without any basis being stated.

III. Argument as to Affected Party

A. Hearing Request Requirements.

In order to have the Commission grant a contested case hearing, the Commission is required to determine that a requestor is an "affected person." Determination of affected person status is based on one having a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. 30 TAC §55.203. The Rule outlines six required factors to be considered. *Id.* The Rule also indicates that an interest common to members of the general public does not qualify as a personal justiciable interest. *Id.* The following factors are to be considered:

1. Whether the interest claimed is one protected by the law under which the application will be considered;
2. Distance restrictions or other limitations imposed by law on the affected interest;
3. Whether a reasonable relationship exists between the interest claimed and the activity regulated;
4. Likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
5. Likely impact of the regulated activity on the use of the impacted natural resource by the person; and
6. For governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC §55.203.

B. Specifics as to Requestor HRC - Distance.

HRC states in their letter that they own “approximately 7,000 acres of land in Cherokee County, Texas which Flat Creek tracks across, *and is located approximately 2.9 miles downstream of the effluent discharge point.*” By their very admission, HRC’s land lies outside the one (1) mile radius of the discharge point. HRC does not indicate how land which is 2.9 miles downstream of the effluent discharge point is impacted. They continue in their letter of February 9, 2010, indicating: “HRC holds Water Use Permit No. 12047, issued by the TCEQ on August 25, 2008, which permits HRC to construct and maintain two reservoirs on Flat Creek to be used for recreational purposes. *Both reservoirs will be downstream of the effluent discharge point, with the northernmost lake approximately 3.1 miles downstream.*” Thus, the reservoirs which have yet to be built are located even further downstream of the effluent discharge point and HRC has

failed to assert how the effluent discharge directly impacts property or a reservoir (or two), which have yet to be built, so far downstream.

C. Specifics with Requestor Van Dellen and TCA – Distance.

Van Dellen and TCA do not assert any ownership interest from which to ascertain whether distance can be a point to be considered. Their basis is solely from *use* of public bodies of water in the same or similar fashion of any member of the public and even in that, they fail to show that their activities are within the one mile radius, merely alluding to trips on the Neches River and short segments of Flat Creek. Although Van Dellen's letter asserts that there are others who would be affected by this Amendment, no names or addresses are given so that their distance might be ascertained.

D. Specifics with Requestor HRC - Impact on Health and Safety/Natural Resources

HRC states that the Applicant fails to demonstrate how the application will not result in violation of water quality standards, that it may result in degradation of the water quality and that the discharge could have an adverse impact on recreational reservoirs. Applicant's discharge under the amended permit is at the same standards as the treated water that is currently being discharged. The current standard being requested and approved by TCEQ for discharge (based on a 30-day average, are 10 mg/l CBOD₅ and 15 mg/l TSS, 3 mg/l NH₃ –N and 6.0mg/l minimum dissolved oxygen (DO)) is well within the standards allowed by TCEQ and found to be protective of the waters of the state. The Executive Director in their Response to Comments (Comment 3, Response 3) indicates it reviewed the uses of the receiving waters and set effluent limits which are protective of such uses. They have indicated that the unnamed tributary has no significant aquatic life use and high aquatic life use for Flat Creek. They further

indicate that those uses were taken into account when the permit was evaluated. As noted, the permit includes effluent limitations and monitoring requirements to ensure that the discharge will not violate the Texas Surface Water Quality Standards. Further, the ED notes that the permit also includes additional requirements for the wastewater treatment system to ensure the protection of water quality and human health. While HRC states that it “believes the Application may very well cause such standards to be violated” they fail to assert how or the basis for such belief, other than a possibility that the “discharge could result in depressed dissolved oxygen levels.” HRC does not indicate how or why they believe this may occur. The antidegradation review of the receiving waters indicates that existing uses should be maintained and protected, but can be reexamined and may be modified if *new information is received*. HRC has not provided any *new information* that should be taken into account which might result in the Commission reexamining such conclusion. The limits in the proposed permit are not different than current limits of effluent that is being discharged and HRC has failed to show how those limits have harmed the health and safety or natural resources, let alone property nearly 3 miles downstream. As to the reservoirs, it is noted in the ED’s Comments that only *existing* waterbodies are evaluated for purposes of determining potential impacts to receiving waters; the reservoirs are not developed and therefore are not taken into account at this time. Should information be presented to the Commission in the future, the Commission and its staff has the ability to reexamine all the data and determine whether any effluent limits and their treatment need to be modified. (Comment 3, Response 3) As to any wells on HRC’s property, Comment 5 and Response 5 indicate that by meeting the Texas Surface Water Quality Standards, the groundwater quality in the vicinity will likewise be protected. HRC continues to raise the issues of compliance history, regionalization and removal of “emerging contaminants” and the ED’s

Responses (Comments and Responses 1, 9 and 13) all have been addressed and again, no new information is being provided to cause the ED to reexamine their responses.

E. Specifics of Requestor Van Dellen and TCA – Health and Safety/Natural Resources

As noted earlier, Van Dellen and TCA fail to state how their previous comments and the ED's responses are inadequate in protecting health and safety. Applicant and the ED are unable to properly assess and address any lingering concerns Van Dellen and TCA may have which might be new and/or different or based on new information that have not already been addressed. Van Dellen asserts that he canoes, kayaks, guides people on canoe trips and has taken photographs; the last two activities he asserts have been done as part of his profession and he intends to continue with them. While Van Dellen asserts that this translates into an economic interest, he has failed to show how the discharge will have a negative economic impact or any impact at all. Since there is already discharge along this same pathway, Van Dellen fails to assert how this major amendment will change any conditions in Flat Creek or the Neches River or have any effect on those waterbodies. Van Dellen has failed to provide any necessary information to determine his interests. Van Dellen asserts that his "economic interests will be affected, adversely if damage is done to Flat Creek or the Neches River" but does not clarify the adversity or how he perceives damage might occur. To entertain Van Dellen as an "affected person" is speculative at best. He has described nothing that others cannot and have not done as members of the general public. Van Dellen must have some legally cognizable interest that is sufficiently unique to him and he has failed to allege such facts sufficient to show he is likely to suffer economic injury, nor has he shown how his economic interest is distinguishable from those of the general public. *See, Stop the Ordinances Please v. City of New Braunfels*, ___ S.W.3d, 2010

WL 567003 (Tex. App. – Austin, 2010). His “recreational purposes” of paddling a canoe is no different than the general public. Numerous cases have held that recreational use must be distinct and distinguished from the general public. See, *San Antonio Conservation Soc. V. City of San Antonio*, 250 S.W.2d 259 (Tex.Civ.App. – Austin 1952, writ ref’d); *Persons v. City of Fort Worth*, 790 S.W.2d 865 (Tex. App. – Fort Worth 1990, no writ); *Texas Rivers Protection Ass’n v. Texas Natural Resource Conservation Comm’n*, 910 S.W.2d 147 (Tex.App – Austin 1995, writ denied). In fact, the Court in *Texas Rivers Protection Assoc. v. Texas Natural Resource Conservation Commission*, 910 S.W.2d 147 (Tex. App. – Austin 1995) found that the standing of the parties for either the administrative case or the judicial review were the same: the parties contesting the matter *owned* property.” (Emphasis added) The Court placed great weight on the ownership interest noting that “Appellants’ riparian ownership alone sufficiently distinguishes their injury from that of the public at large.” *Id.* At 151. Therefore, mere expression of recreational use is not enough to confer standing and even coupled with vague assertions of some economic interest does not raise Van Dellen to the level of an affected party. What must be ascertained is the affect on some property right and Van Dellen has woefully failed to present such evidence.

IV. Affected Person Status as to Association

A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

1. One or more members of the group or association would otherwise have standing to request a hearing in their own right;
2. The interests the group or association seeks to protect are germane to the organization’s purpose; and

3. Neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

By review of the letter from Dr. Van Dellen, TCA's interests which it seeks to protect seem to be germane to the organization's purpose. It is not clearly asserted whether the claim asserted or the relief requested requires participation of the individual members. However, Applicant does not believe the final prong is met. Should Van Dellen fail to be approved as an "affected person" TCA would also fail; Applicant asserts this is correct and the requests the Commission to so find. The Request for Contested Case Hearing letter of February 11, 2010 also asserts that it has members who will be affected by the proposed amendment, but only puts forth Van Dellen.

V. Conclusion

There are threshold standards that are to be met if one (or an entity) desires to become an "affected party" for purposes of a contested case hearing. One must specify justiciable interests that will be affected by the activity proposed. Because the requests filed failed to adequately specify justiciable interests that will be affected by the Applicant's Proposed Permit or the discharge allowed thereunder, they have failed to demonstrate that they are affected persons entitled to request a contested case hearing and thus, their requests should be denied. Alternatively, should the Commission deem to refer this Application to SOAH for any determination, it should exclude regionalization or locational issues, cumulative effect of unbuilt reservoirs, emerging contaminants which TCEQ does not yet regulate, odor control and buffer zones, wetlands, wastewater treatment plant designs or specifications, best available technologies or monitoring.

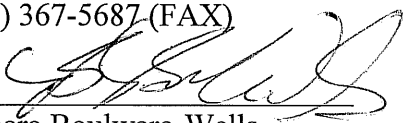
VI. Prayer

Applicant prays that the Commission determine that the requests of HRC and Van Dellen did not adequately specify justiciable interests that will be affected by the Application, and thus, were not valid requests for contested case hearing. Applicant further prays that the Commission find TCA's request to not be valid due to no valid member and that no other valid hearing requests were filed on the Application. Applicant finally prays that the Commission pursuant to 30 TAC §55.122(b)(2), determine that no hearing requests meet the relevant TAC requirements and standards and act on the Application by approving the Proposed Permit.

Alternatively, should the Commission refer the matter to SOAH, Applicant prays that the Commission order regionalization or locational issues, cumulative effect of unbuilt reservoirs, emerging contaminants which TCEQ does not yet regulate, odor control and buffer zones, wetlands, wastewater treatment plant designs or specifications, best available technologies or monitoring be specifically excluded from the issues to be considered at the SOAH hearing, focus the SOAH determination solely to the "affected party" status of the two Requestors, and that all proceedings in the matter, including the preliminary hearing, be held in Austin, Texas at the SOAH building.

Respectfully submitted,

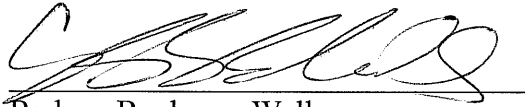
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct of this document was filed with the Office of the Chief Clerk and sent by first class mail and/or facsimile to the persons listed in the mailing list attached.

A handwritten signature in black ink, appearing to read 'Boulware-Wells', written over a horizontal line.

Barbara Boulware-Wells

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